No. 42529-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Russell Homan,

Appellant.

Lewis County Superior Court Cause No. 11-1-00036-7

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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2. The evidence was insufficient to prove the elements of Luring.

3. The prosecution failed to prove beyond a reasonable doubt that Mr. Homan ordered, lured, or attempted to lure a minor child into an area or structure obscured from or inaccessible to the public.

4. The trial court erred by adopting Conclusion of Law No. 2.2.

5. The Luring statute is unconstitutionally overbroad.

6. Mr. Homan was convicted through operation of a statute that is unconstitutionally overbroad.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To obtain a conviction for Luring, the prosecution was required to prove that Mr. Homan ordered, lured, or attempted to lure a minor child into an area or structure obscured from or inaccessible to the public. The prosecution's evidence established that Mr. Homan bicycled past C.N. without stopping, asked if "you" wanted candy, and said that he had some at his house. Did Mr. Homan's Luring conviction infringe his Fourteenth Amendment right to due process because it was based on insufficient evidence? (Assignments of Error 1, 2, 3, 4)

2. A statute is unconstitutional if it criminalizes a substantial amount of protected speech. The Luring statute criminalizes a substantial amount of protected speech. Is the Luring statute unconstitutionally overbroad in violation of the First and Fourteenth Amendments? (Assignments of Error 5, 6)

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Russell Homan rode his Superman BMX bicycle past 9-year-old C.N., who was on an errand to a neighborhood store. CP 3-4. Mr. Homan did not stop or slow down. While riding past, he asked "Do you want some candy? I've got some at my house." CP 4; RP 36. C.N. said nothing, but continued walking. Mr. Russell rode past C.N. without looking back. CP 4. There were at least two other children nearby, but Mr. Russell was closest to C.N. when he spoke.[1] RP 46-47; 49. C.N. did not know Mr. Russell. CP 4.

Mr. Russell was charged with Luring. CP 1. He was convicted following a bench trial, and he appealed.[2] CP 3, 6, 15.

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[1] No evidence was presented regarding the identity of the other two children, or whether they knew Mr. Russell. *See* RP *generally*; CP 3-5.

[2] He also filed a motion for reconsideration. Motion for Reconsideration, Supp. CP. The motion was denied. Order Denying Reconsideration, Supp. CP.

ARGUMENT

I. MR. HOMAN'S LURING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT FOR CONVICTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove that Mr. Homan ordered, lured, or attempted to lure a minor into an area or structure obscured from or inaccessible to the public.

To obtain a conviction for Luring, the prosecution was required to prove that Mr. Homan "order[ed], lure[d], or attempt[ed] to lure a minor… into any area or structure that is obscured from or inaccessible to the public…" RCW 9A.40.090.

The basis for the conviction was testimony that he rode his Superman BMX bicycle past C.N., and said "Do you want some candy? I've got some at my house." RP 36. Even assuming Mr. Homan was addressing C.N.—something that was not conclusively established by the

testimony—this evidence is insufficient to establish that he was attempting to lure anyone *into* an area or structure obscured from or inaccessible to the public. Even taking the evidence in a light most favorable to the prosecution, nothing about the brief communication suggests an attempt to lure C.N. into a house (or any other nonpublic area); instead, the testimony suggests (at best) that Mr. Homan was offering C.N. candy. *See, e.g., State v. McReynolds*, 142 Wash.App. 941, 948, 176 P.3d 616 (2008).

The prosecution failed to prove the elements of Luring. Because the evidence was insufficient, Mr. Homan's conviction violated his right to due process. *Engel, at* 576. The conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

II. THE LURING STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at* 702. A manifest error affecting a constitutional right may be raised for the first time on review.[3] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823,

[3] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d

203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

B. A first-amendment challenge may be brought by anyone accused of violating a statute that is unconstitutionally overbroad.

> The First Amendment to the U.S. Constitution provides that
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. I. This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wash.2d 763, 768, 322 P.2d 844 (1958) (collecting cases).[4]

6042011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

[4] Washington's Constitution affords a similar protection: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Wash. Const. Article I, Section 5.

A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 26, 992 P.2d 496 (2000). Anyone accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Id.* An overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused. *Id.* In other words, "[f]acts are not essential for consideration of a facial challenge...on First Amendment grounds." *City of Seattle v. Webster,* 115 Wash.2d 635, 640, 802 P.2d 1333 (1990), *cert. denied,* 500 U.S. 908, 111 S.Ct. 1690, 114 L.Ed.2d 85 (1991).

The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 156 L. Ed. 2d 148, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, "[t]he Supreme Court has 'provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or "chill" constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.'" *United States v. Platte*, 401 F.3d 1176, 1188 (10th Cir. 2005), *quoting Virginia v. Hicks, at* 119; *see also Conchatta Inc. v. Miller,* 458 F.3d 258, 263 (3d Cir. 2006).

C. RCW 9A.40.090 is unconstitutionally overbroad because it criminalizes a substantial amount of protected speech and conduct.

A statute that criminalizes some protected speech activity violates the First Amendment if it prohibits "a substantial amount of protected activity." *State v. Immelt*, ___ Wash.2d ___, ___, ___ P.3d ___ (2011). The Luring statute fails this test.

Assuming the other requirements of the statute are met, the law prohibits *any* speech that could possibly entice a minor to enter an area, structure, or motor vehicle.[5] The statute thus criminalizes statements that are made in jest, statements that are misunderstood as orders, statements that are genuine offers of help, or friendly invitations from one child to another, if accompanied by an enticement. For example, a teenager who says to a group of her peers "Let's go to my house; I made cupcakes" is guilty of Luring if her invitation extends to minors that she doesn't know. Similarly, a motorist who witnesses a hit-and-run may not offer to drive a child victim home (or to the hospital) without risking prosecution. This is so even if the motorist/witness is an EMT driving an ambulance, "enticing" the child with an offer of medical care.

[5] The Court of Appeals has interpreted the statute to require an enticement, which it characterized as something more than an invitation. *State v. Dana*, 84 Wash.App. 166, 926 P.2d 344 (1996).

Nor is the problem solved by the affirmative defense in RCW 9A.40.090(2). As the U.S. Supreme Court has noted,

> [t]he Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 256, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). The government cannot burden protected speech and then ask individuals to affirmatively prove that their speech is protected; such an approach necessarily chills protected speech:

> Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech.

Ashcroft v. ACLU, 542 U.S. 656, 670-671, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

The Luring statute is unconstitutionally overbroad. *Lorang, at* 26. Accordingly, Mr. Homan's conviction must be vacated and the charge dismissed. *Id.*

D. Division I's Opinion in *Dana* was wrongly decided and should not be followed.

Division I has denied an overbreadth challenge to RCW 9A.40.090. *Dana, supra.* According to the *Dana* Court, "[t]he impact on

protected speech is minimal because a mere invitation… is not sufficient [for conviction]… [T]he invitation must include some other enticement." *Id, at* 175. This is incorrect for two reasons.

First, the *Dana* Court fails to address Luring committed by ordering a minor child into an area, structure, or motor vehicle. Thus, for example, a homeowner cannot order a trespassing child to leave his fenced yard, if the only means of departure is through the house or garage. Nor could a police officer order a child into a patrol car following arrest, without violating the letter of the statute.

Second, the Court in *Dana* erroneously described the legitimate sweep of the statute as "large," when compared to the protected speech that falls within its ambit. In fact, the statute's legitimate target is a narrow category of behavior—efforts by adults (and older children) to remove vulnerable victims from public view, for evil or improper purposes. In contrast to this narrow category, the legitimate (and even beneficial) circumstances wherein a person might order or entice a minor to enter an area, structure or motor vehicle are almost limitless.

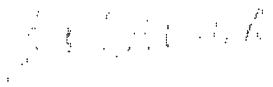
The law is substantially overbroad, contrary to the *Dana* Court's conclusion. *Dana* should not be followed.

CONCLUSION

For the foregoing reasons, Mr. Homan's conviction must be reversed and the case dismissed with prejudice.

Respectfully submitted,

BACKLUND AND MISTRY



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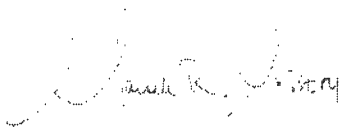

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Sarah I. Beigh
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 18, 2011.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 18, 2011 - 8:24 AM

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